UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: June 27, 1997

CASE NO.: 95-INA-133

In the Matter of:

LA HACIENDA RESTAURANT,
Employer,

on behalf of

DELIA SANCHEZ DE CRUZ,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Delia Sanchez De Cruz (Alien) by La Hacienda Restaurant (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

at the place where the alien is to perform the work: (1) there are not sufficient workers in the United‘States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions.

STATEMENT OF THE CASE

On January 15, 1993, the Employer, La Hacienda Mexican Restaurant, filed an application for labor certification to enable the Alien, Delia Sanchez de Cruz, to fill the position of Head Cook.[2] AF 173. The minimum education and experience required were six years of schooling and two years of experience in the job offered or a related occupation. An added requirement was the ability to speak English and Spanish "in order to deal with help and vendors." The job duties were as follows:

> Run the entire kitchen and the crew. Prepare salsas from old family recipe. All food is prepared fresh, no canned items. Know the preparation of the Mexican mole, carnitas, enchiladas, (red sauce and green sauce), prepare the tacos and biria. Must be able to introduce new recipes. Complete use and knowledge of all standard restaurant equipment.

Recruitment. The resumes of two applicants were submitted to Employer by the Employment Development Department (EDD) as the state agency on October 20, 1993. (AF 202). By its letter of October 26, 1993, Employer notified U. S. applicants Ybarra and Ragovich that it was conducting interviews on Saturday, November 6, 1993, at 8:00 a.m., advising them to bring a copy of their food handler’s card, proof of legal status and letter of recommendation. AF 200-201. As the Employer did not provide its own telephone number in the letter, these applicants were limited in their capacity to respond to the Employer.

On November 6, 1993, Employer advised EDD that only one applicant had appeared for the interview, that he was twenty minutes late, and he did not have the qualifying experience. AF 196.[3] Employer said it did not believe that this one applicant was a good candidate because he was late for the interview. By its letter of December 21, 1993, however, the Employer informed EDD that neither Mr. Ybarra nor Mr. Ragovich appeared for the

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]This letter indicated that it was referring to Employer’s application in behalf of Celia Sanchez Cortez.

scheduled interview. AF 196.[4]

Notice of Findings. The CO's March 11, 1994, Notice of Findings (NOF) advised Employer that certification would be denied, subject to rebuttal, because the Employer failed (1) to prove that the job was truly open to U.S. workers; (2) to show that the U.S. workers were rejected for job-related reasons; and (3) to provide the Alien's work history for the past two years, as required by ETA 750B, since her employment from 1975 to 1988 for Sanchez Restaurant in Mexico was the only employment listed in the application. AF 226.

The CO noted that the Alien had the same last name as Employer's owner and she was Employer's head cook. The job duties included preparing salsas from an old family recipe, and before the local office required the Employer to change Item 13 of the original ETA 750 A, those duties also required that the applicant "Guard the secret" of that old family recipe. Drawing reasonable inferences from these circumstances, the CO directed that the Employer disclose additional information regarding the relationship between Employer and the Alien, including (1) the Alien's ownership interest, if any, and whether the Alien or someone related to the Alien owned part or all of the company, and (2) that the Employer show how this job offer was clearly open to a U.S. worker. Employer was also told to submit articles of incorporation, listing the names and titles of all corporate officers, if incorporated, and to showing the relationship, if any, of the Alien to any corporate officer or officers. Finally, the Employer was directed to establish that the person who makes the hiring decision was completely independent of the Alien and the Alien's influence.

As to the Employer's rejection of U.S. workers, the CO found that Mr. Ybarra appeared to be qualified. While Mr. Ybarra was rejected for failing to attend the scheduled interview, it appeared that Employer's attempts to contact him were minimal, and for this reason the CO was not persuaded that Mr. Ybarra was unavailable for hiring by the Employer within the meaning of the Act and regulations. The CO found was no evidence that proved (1) the date Employer mailed its letter of October 26, 1993; (2) whether or not that letter was received; and (3) the date that it was received by Mr. Ybarra. The CO noted also that while this letter said that interviews were being conducted on the date indicated, it did not invite the applicant to reschedule the interview by making a telephone call, if necessary. It is reasoned that, if Mr. Ybarra did not receive his letter in

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[4]Because of a confused duplication of names that is significant infra, it is particularly noted that in this instance the Employer's letter clearly indicated that it was transmitted in support of the application on behalf of Delia Sanchez de Cruz.

sufficient time to attend the interview, he might have thought he had missed a group interview session from which the Employer would have selected a worker to fill this position.

The CO noted the discrepancy between the Employer's letters of November 6, 1993, and December 21, 1993, as one said Mr. Ybarra was twenty minutes late while the other indicated he did not arrive at all. With regard to the tardiness of this U. S. applicant, the CO said the Employer's letter suggested that there would be a group waiting to be interviewed. Consequently, the CO expected the Employer to show that it attempted to contact the applicants in sufficient time to attend the interview, as scheduled, before finding that this applicant was not qualified simply because he arrived twenty minutes late. The CO further observed that under all of the circumstances presented, the Employer would have been expected to make more than a single attempt to contact the only U. S. worker that it deemed a resume qualified applicant. This was especially the case, since Mr. Ybarra had supplied a telephone number to use in reaching him. In summary, Employer was directed to show with specificity why the Employer had rejected Mr. Ybarra for job related reasons.

Rebuttal. The Employer's rebuttal letter admitted that the Alien is the owner's sister, but said that she had no ownership interest in the company. The Employer added that Mr. Ybarra was sent a letter stating the day and time of the job interview, and advising that at this time the Employer would also interview U. S. job candidates in connection with the applications of three other workers whom it was sponsoring. In the Employer's opinion, even if Mr. Ybarra assumed there would be other people being interviewed and that he could show up 20 minutes late, such conduct "was presumptuous and was a flagrant disregard for the Employer's requirement for punctuality." AF 107. In "another related case, that my processor is working on," continued the Employer, "Mr. Ybarra showed up late for that interview." The Employer concluded that it is not required to hire someone that appears over twenty minutes late for an interview, adding that Mr. Ybarra could have called when he realized he was running late. Employer then remarked that Mr. Ybarra "has a history of being late for work and is almost always late."

Addressing the contradiction noted by the CO in Employer's statements regarding the interview, the Employer stated that it has two cases at the same time with the same CO, observing that its responses were mailed at the same time. In this instance, said the Employer, Mr. Ybarra arrived twenty minutes late, and Mr. Ragovich did not appear at all. If Mr. Ybarra needed to postpone the interview appointment, said the Employer, he could have looked up Employer's number in a telephone directory or he could have asked an Information Operator for its telephone listing. Employer regarded Mr. Ybarra's failure to make these

inquiries as demonstrating "a total lack of punctuality, lack of initiative, and a lackadaisical attitude, surely an attitude that is not conducive for an employer to enthusiastically embrace a potential worker." The fact that Ybarra did appear, albeit twenty minutes late, "more than proves that he had obtained the letter in advance." Employer then added a further objection to this U. S. worker, saying that Mr. Ybarra was "deficient in English."

As to the Alien's own qualifications, the Employer said her work history for the past two years was given on ETA 750B, and that it would attach to its rebuttal letter the Alien's birth certificate, papers indicating the ownership of the restaurant, the interview notice to Ybarra, the letters sent on October 26, 1993, November 6, 1993, and December 21, 1993, and the Alien's ETA 750 B. In addition, the Employer attached to its rebuttal an affidavit dated April 7, 1994, by an investigator who said that when he investigated Mr. Ybarra's home address, the neighbors advised him that Mr. Ybarra could barely speak English, that he had a great deal of difficulty getting a job, and that he had moved out some time ago. The investigator also said that he found no forwarding address or telephone listing for Mr. Ybarra. AF 110. The Employer also attached its written response to the cover letter by which EDD had forwarded the resumes of Mr. Ybarra and Mr. Ragovich. The Employer indicated "No shows" on this letter and it further wrote as to Mr. Ybarra that he "could not speak English well." AF 166. The Employer also submitted a menu from the restaurant, which included several pages in Spanish, and a copy of the business license for the restaurant, and information about the Food Handler Program and other documents which are not relevant to these issues.

Final Determination. The CO denied certification in a Final Determination (FD), dated April 28, 1994, in which the Employer's rebuttal was found to be unpersuasive. AF 27. The CO said that the Employer failed to rebut the NOF finding that Mr. Ybarra's rejection was for reasons that were not job-related, as Employer failed to demonstrate a good faith effort to contact and recruit this applicant. The CO found that its rebuttal failed to state whether Ybarra was late or did not appear, observing that the rebuttal indicated that Ybarra was twenty minutes late to an interview for one of Employer's other recruitment efforts. The CO concluded that the qualities of "lack of punctuality, lack of initiative, and a lackadaisical attitude" which the Employer had attributed to Ybarra arose from an indirect reference to another case that was unrelated this application.

The CO further found that the statements as to Mr. Ybarra by Employer's investigator were based on second hand information from unidentified third parties, and that no actual evidence was presented either that Ybarra could not speak English or that his

presence in the United States was illegal. The CO further found that, while the Employer clarified that the Alien was his sister and he asserted that she had no ownership interest in Employer's restaurants, the Employer failed to identify its owners beyond this admission that the Alien is intimately related to the owner. More particularly, the Employer failed to identify all of the owners of the firm, or to disclose the Alien's employment for the last two years, as directed by the CO in the NOF.

Motion to Reconsider. The Employer owner filed a "Motion to Reconsider Final Determination" on May 20, 1994. AF 19. Employer contended that information which was not available at the time of its rebuttal warranted reconsideration of the denial by the CO. The Employer now argued with regard to Mr. Ybarra, that (1) every effort was made to reschedule the job interview by sending him letters to reschedule the interview, but he had already moved and left no forwarding address; and (2) attempts to telephone Mr. Ybarra were fruitless, as there was no answer, and the phone was disconnected. Employer reiterated its opinion that Mr. Ybarra either was an undocumented illegal alien, was dealing in drugs, or was otherwise engaged in doing something illegal. Employer also suggested that Mr. Ybarra had chosen not to go through with the interview because he was asked for references. Employer then pointed to an unrelated case in which its immigration agent, Susan Jeannette, also had appeared, to buttress his argument that Mr. Ybarra lacks punctuality, contending that he had arrived late for an interview in that unrelated case. Employer also asserted that Mr. Ybarra told him at the interview that he could not speak English and, while his resume asserted that he was punctual, Mr. Ybarra was late for this interview.

An unsigned letter from Employer's owner, dated May 6, 1994, requesting that the denial of labor certification be reviewed was attached to the motion to reconsider. AF 23. The Employer again argued that Mr. Ybarra has a "chronic problem with punctuality," and emphasized that the Employer's December 21, 1993, letter has nothing to do with this case, and Employer once more contended that Mr. Ybarra's facility in speaking English was "severely lacking." At this point the Employer finally submitted his sworn but unsigned statement, admitting that he is the sole proprietor of Employer, conceding that the Alien had been working for him over the previous two years, and repeating his assertion that only one of the two U.S. applicants who appeared at the appointed interview was late. As corroboration, the Employer also appended the Alien's signed statement in which she admitted that she had worked since 1989 in the restaurant owned by her brother, the Employer, and adding that he had not paid her for her services.

Employee's motion to reconsider was denied by the CO because the issues it had raised could have been addressed in Employer's rebuttal, citing **Harry Tancredi**, 88-INA-441 (Dec.. 1, 1988)(en

banc). The CO again found that the Employer failed to establish that Mr. Ybarra was either contacted or interviewed regarding the position, and that the Employer had failed to show that this job is truly open to U.S. workers within the meaning of the Act and regulations. The CO explained that the third party information on which the Employer relied had been found deficient, and that the Department of Labor would not consider the Employer's request to review a second employer's application. Employer was advised that the Appellate Record was being referred for review by the Board of Alien Labor Certification Appeals. Apparently ignoring this finding, the Employer filed a second "Motion to Reconsider Final Determination" on July 7, 1994. AF 04.[5]

DISCUSSION

If an employer attempts to contact an applicant after the CO alleges that the applicant was not contacted or interviewed, or was rejected, the fact the employer shows that the applicant is now unavailable does not cure the initial violation. **Bruce A. Fjeld**, 88-INA-333 (May 26, 1989)(en banc). While the Employer asserts in this case that he attempted to contact Mr. Ybarra to reschedule the job interview, it is not clear whether this act occurred before or after the NOF was issued. If this happened before the NOF, it is unclear why Employer tried to reschedule an interview for an applicant who already had attended an interview. If Mr. Ybarra had not attended that interview, the CO's finding that the Employer failed to clarify that initial contradiction between the letters of November 6, 1993, and December 21, 1993, remains an issue. On the other hand, if the attempts to contact Mr. Ybarra occurred after the NOF was issued, they are a nullity because the CO did not request or authorize such action in the NOF. Consequently, these acts cannot cure the initial violation.

20 CFR § 656.21(b)(6) requires an employer to establish that U.S. workers applying for the job opportunity have been rejected solely for lawful job-related reasons. A U. S. job applicant is considered qualified for a job, if he meets minimum requirements specified for that job in the labor certification application. **United Parcel Service**, 90-INA-90 (Mar. 28, 1991). While the CO found Mr. Ybarra to be qualified, Employer's rebuttal placed great emphasis on its assertions that Mr. Ybarra once was twenty minutes late in arriving at a job interview, that he was "almost always late," and that his ability to speak English was deficient.

The Employer has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. **Cathay Carpet**

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[5]While the CO does not appear to have ruled on this motion, it has been examined on review and does not appear to have raised any issue relating to the denial of the first motion to reconsider that would suggest that it is meritorious or that it requires further action by the CO at this time.

Mill, Inc., 87-INA-161 (Dec.. 7, 1988)(en banc). An employer who fails to explain or document the U. S. applicant's lack of qualifications likewise fails to specify a lawful job-related reason for rejecting the U. S. applicant. **Seaboard Farms of Athens, Inc.**, 90-INA-383(Dec.. 3, 1991).

First, Employer's rebuttal failed to offer more than vague and unsupported assertions regarding Mr. Ybarra's "deficient English" to attack his qualifications in its rebuttal, as his fluency in English was not mentioned in its initial rejection of this applicant. This objection is rejected because the Employer failed to connect up any such deficiency with the performance of the job duties it described in this application. It appears that the CO did not mention in the NOF need to prove the business necessity of the Employer's added job requirement that the applicant have the ability to speak English and Spanish "in order to deal with help and vendors," as noted above. If this language requirement was an objection, it has been waived for this reason. On the other hand, it now is a central issue that the Employer rejected Mr. Ybarra because it claims that he speaks more Spanish than it finds desirable. While this may or may not have a bearing on his capacity to perform the duties of his position, the Employer's failure to reconcile this contradiction between its two positions on linguistic fluency vitiated any regard for this objection as a serious issue in this case.

Second, while the Employer never explained whether Mr. Ybarra appeared twenty minutes late for an interview with the Employer for this position or that he never arrived at all, it is undisputed that the Employer's reasons for rejecting him as a job applicant were both subjective and unsubstantiated. Even though a subjective reason for rejecting a U.S. worker is not unlawful, per se, the Employer failed to explain how it arrived at the subjective conclusions it reported nor did it establish that its reasons related to impairments that materially affected Mr. Ybarra's capacity to perform the duties of this job. While the Employer might have offered proof that it was not possible to verify its subjective reasons, no such evidence is found in this record. It follows that this absence of supporting evidence that made the Employer's subjective reasons for rejecting Mr. Ybarra objectionable, and the CO was correct in finding that it was sufficient to support the rejection of certification in this case. **Rebecca Cantarero**, 90-INA-70 (March 31, 1993).

Finally, it is not clear whether Mr. Ybarra was even interviewed for the position at issue in this proceeding. As the CO observed, if Mr. Ybarra was interviewed and appeared twenty minutes late, Employer's letter, which did not contain Employer's telephone number or a contact person, was written in such manner as to imply that a group of interviews would occur, commencing at 8:00 A.M. The letter gave no indication that the job interview

for this applicant was to start at 8:00 A.M. For an applicant to arrive twenty minutes after what appears to be the commencement of a series of interviews is not a sufficient reason to call him "presumptuous" and to charge that he showed a "flagrant disregard for the employer's requirement for punctuality."

Summary. Employer has failed to show that its rejection of Mr. Ybarra because of his alleged tardiness was either lawful or job related. Indeed, the record gives no indication that the Employer asked Mr. Ybarra why he was late, or whether Mr. Ybarra was given the opportunity to offer an explanation for this tardiness. On the other hand, if, as the CO assumes, Mr. Ybarra did not appear for this interview, the record indicates that the Employer made no attempt to recontact him. When it is further considered that there also is no evidence as to when or whether the interview letter was received by Mr. Ybarra, proof of such circumstances constitutes a further reason for the denial of labor certification, as it supports the inference that the Employer's recruiting effort was not bona fide. Because the Employer failed to sustain its burden of proof in addressing the issues raised by the NOF, we find that the CO properly denied certification under the Act and regulations, and the following order will enter.

ORDER

The Certifying Officer's denial of certification is Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO.: 95-INA-133

LA HACIENDA RESTAURANT, Employer,
DELIA SANCHEZ DE CRUZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 18, 1997